IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RACHAEL ANN CLAFLIN,

Plaintiff,

v.

MANDARICH LAW GROUP, LLP, a California limited liability partnership, and RYAN EARL VOS, individually and in his official capacity,

Defendants.
_____/

No. C 13-05255 WHA

ORDER DENYING MOTION TO DISMISS OR STAY BASED ON PRINCIPLES OF ABATEMENT

INTRODUCTION

In this debt-collection practice action, defendants move to dismiss or stay based on principles of abatement. To the extent stated below, defendants' motion is **DENIED**.

STATEMENT

In December 2012, defendants Mandarich Law Group, LLP and Attorney Vos filed an action on behalf of CACH, LLC against plaintiff Rachael A. Claflin in Santa Clara County Superior Court. *CACH, LLC v. Rachael A. Claflin, et al.*, No. 1-13-cv-238859 (Santa Clara Cnty. Sup. Ct. Dec. 28, 2012). When the state-court complaint was filed (and at all relevant times alleged in that complaint), "Plaintiff was a resident of Alameda County, California." Ms. Claflin also "did not apply for the alleged debt or sign a credit application or credit agreement for the alleged debt, in Santa Clara County, California" (Compl. ¶¶ 13, 16, 17).

In November 2013, almost a year later, plaintiff Rachael A. Claflin filed the instant action against defendants Mandarich Law Group, LLP and Attorney Ryan Earl Vos, who were (and still are) counsel for the other side in the state-court action. Defendants in this action were not named parties in the state action. The operative complaint alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692, *et seq.* and the Rosenthal Fair Debt Collection Practices Act, California Civil Code Sections 1788–1788.33. The gravamen of the complaint is that defendants are "debt collector[s]" and violated federal and state laws when they (*id.* at ¶¶ 27, 35) (emphasis added):

> brought a legal action against Plaintiff to collect a defaulted consumer debt allegedly owed by Plaintiff *in a judicial district other than the judicial district in which Plaintiff signed the contract sued on or in the judicial district in which Plaintiff resided at the commencement of the action*

In other words, by filing the state action in "Santa Clara County — a distant and inconvenient venue — Plaintiff was required to retain legal counsel and incur attorneys' fees and costs in order to have the [state action] complaint transferred to the appropriate venue, Alameda County, California" (*id.* at ¶ 19). This order pauses to note that plaintiff's complaint filed in the instant action (after the state action was transferred to Alameda County) stated the instant federal action "should be assigned to the San Jose Division" (*id.* at ¶ 7). The action, however, was reassigned to the undersigned judge in December 2013, after there was a declination by plaintiff to proceed before a San Jose Magistrate Judge (Dkt. Nos. 7, 9).

In December 2013, defendants filed the instant motion. Plaintiff responded and defendants replied. The parties appeared for oral argument on February 20, the same day as the first case management conference.

ANALYSIS

Defendants move to dismiss, or alternatively, stay this action based on principles of abatement. Defendants argue this is appropriate because the state action was filed more than ten months before the instant action, the complaints in both actions are duplicative since they stem from the same alleged filing of the state action in the wrong venue and seek identical relief, and parties in privity are involved in both actions.

Furthermore, defendants cite policy factors that favor abatement, including waste of judicial resources from litigating the same issues in two courts, increased cost to litigate two identical cases, and the possibility that dual litigation might cause a race to judgment. Next, defendants allege that there would be no detriment to plaintiff in a dismissal or stay since plaintiff has already names "Roes 1–10" as placeholder defendants in the state action cross-complaint. Finally, defendants question plaintiff's intent in filing this federal action alleging that "counsel has attempted to duplicate his potential recovery in two separate venues."

The question of abatement arises when parties seek to litigate the same or closely related claims in two forums at the same time.

> To determine whether a suit is duplicative, [our court of appeals] borrow[s] from the test for claim preclusion . . . [and] examine[s] whether the causes of action and relief sought, as well as the parties or privies to the action, are the same . . . 'Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together.'

Adams v. Cal. Dep't of Health Servs., 487 F.3d 684, 688–89 (9th Cir. 2007) (quoting *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992)).

This order finds that a stay is not warranted. *First*, the claim is not necessarily duplicative because the FDCPA explicitly states that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person." 15 U.S.C. 1692k(a). This definition includes attorneys who regularly attempt to collect consumer debts. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995). This permits plaintiff to bring FDCPA claims against Mandarich and Attorney Vos — parties that were not named in the state court cross-claim since they were counsel of record in the state action. The Rosenthal Act remedies "are intended to be cumulative and are in addition to any other procedures, rights, or remedies under any other provision of law." Cal. Civ. Code 1788.32. "There is a split in authority on whether law firms fall within the scope of [the attorney] exemption, with the majority of district courts in California concluding that the Rosenthal Act does apply to law firms." *Do v. Hollins Law, P.C.*, No. 3:13-cv-01322-JSW, 2013 WL 4013659, at *4 (N.D. Cal. Aug. 5, 2013) (Judge Jeffrey White).

Second, the parties are not the same. Again, this reflects the intent of the FDCPA and the Rosenthal Act to stamp out "abusive" or "unfair or deceptive" debt collection practices. 15 U.S.C. 1692(e); Cal. Civ. Code 1788.1(b). The FDCPA specifically holds liable "any debt collector" who brings legal action in the wrong venue. 15 U.S.C. 1692i(a)(2). Similarly, the Rosenthal Act states "no debt collector" shall collect or attempt to collect a consumer debt in the wrong venue. Cal. Civ. Code 1788.15(b). Thus, for the purposes of FDCPA and Rosenthal Act suits, parties, even if in privity, are not "the same" because each debt collector is liable for violations of fair debt collection.

Two non-binding decisions from the District of Arizona are not helpful. *Stone v. Baum*, 409 F. Supp. 2d 1164, 1177 (D. Ariz. 2005); *Fernandez v. Virgillo*, No. 2:12-cv-02475-JWS, 2013 U.S. Dist. LEXIS 20959, at *10–11 (D. Ariz. Feb. 15, 2013). In *Stone*, the district court held that abatement was proper when vexatious litigants named the same parties in later actions. *Stone* at 1167–68. Here, the parties are not the same. In *Fernandez*, the district court held that abatement was not proper because defendants in the two actions were not in privity. *Fernandez*, 2013 U.S. Dist. LEXIS 20959, at *11–13. Indeed, the outcome in *Fernandez* seems to support a finding that abatement is not properly found here.

Defendants also argue that, even though defendants are not named parties to the state action, Mandarich, Attorney Vos, and CACH are in privity with one another based on a preexisting substantive legal relationship. Indeed, plaintiff's cross-complaint in the state action seeks, in part, to hold CACH vicariously liable for the conduct of Mandarich and Attorney Vos in filing the state action in the wrong venue (Mot. 4–5). Plaintiff responds that defendants are not in mutual privity with CACH *for the purposes of this motion* because, under the principal-agent theory, a decision for or against CACH (principal) in the state-court action does not bind defendants (agents). Rather, plaintiff alleges that all of the potential liability flows from the actions of Mandarich and Attorney Vos (Opp. 7–9).

A determination regarding privity for preclusion purposes is not the product of a bright-line rule. It is a case-specific inquiry. This order finds that, because the FDCPA and Rosenthal Act specifically hold liable *any* debt collector for violations of fair debt collection practices, a

decision against CACH in the state-action would not necessarily trigger claim preclusion. Thus, the fact that Mandarich and Attorney Vos have a substantive preexisting legal relationship with CACH does not inevitably provide cover from this suit.

In opposition, plaintiff argues that the pertinent decision is *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813–17 (1976), wherein the Supreme Court held that abstention from the exercise of federal jurisdiction is a narrow exception used in extraordinary circumstances. Our court of appeals has recognized eight non-exhaustive factors for assessing the appropriateness of a *Colorado River* stay or dismissal:

> (1) which court first assumed jurisdiction over any property at stake; (2) inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law provides the rule of decision on the merits; (6) whether state court proceedings can adequately protect the rights of federal litigants; (7) the desire to avoid forum shopping; (8) and whether state court proceedings will resolve all issues before the federal court.

R.R. Street & Co. Inc. v. Transport Ins. Co., 656 F.3d 966, 978–79 (9th Cir. 2011).

An analysis under the *Colorado River* factors does not tend to favor abstention. In brief, there is no property at stake. Defendants have not alleged this forum is inconvenient. There is a desire to avoid piecemeal litigation. The state forum obtained jurisdiction first. The federal action includes a federal claim. State courts have concurrent jurisdiction over FDCPA claims but defendants in this action are not named parties in the state action. There is no evidence of forum shopping. Finally, the last factor evaluates whether state court proceedings will resolve *all* issues before the federal court. This order finds, as explained above, the state court proceeding will not necessarily resolve all issues in this action. The Supreme Court has stated:

> [w]hen a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 28 (1983). As the state action presently exists, it will not necessarily resolve all the issues between the parties in this

action because Mandarich and Attorney Vos are not named parties. In sum, this order declines to stay or dismiss this action under *Colorado River*. Accordingly, the motion is **DENIED**.

* * *

Notwithstanding the foregoing, on its own motion, the Court sees a potential problem. In the event that plaintiff herein seeks discovery from the lawyer defendants herein directed to their strategy in the co-pending state action, any such discovery should be postponed until the completion of the state-court action, or at least until a reasonable period of time has elapsed to bring that case to a conclusion. The state-court action has been pending in Alameda County for a year and can be expected to go to trial or terminate before the end of this calendar year. Therefore, any depositions or discovery directed at the lawyer defendants concerning their strategy in the state-court litigation will be stayed at least until **FRIDAY, OCTOBER 10** this year without further order of this court. If the state-court action is terminated sooner, then discovery into the unprivileged matters relating to strategy may be pursued. No other discovery in this case will be stayed. All discovery in the state case will also be usable in this case.

CONCLUSION

For the reasons stated above, and subject to the very last paragraph above, the motion to dismiss or stay based on principles of abatement is **DENIED**.

IT IS SO ORDERED.

Dated: February 20, 2014.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE